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NO. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NINETY-TWO POINT SEVEN BROADCASTING, INC., ET AL., PETITIONERS

v.

HANOVER RADIO, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the order of the Circuit Court of the City of Richmond which ordered an applicant to do and refrain from doing certain actions before the Federal Communications Commission impinged upon the Federal Communication Commission's ability to regulate communications.
2. Whether the Circuit Court of the City of Richmond had jurisdiction to grant specific performance of a proposed settlement agreement which was filed before the Federal Communicators Commission but not approved pursuant to 47 U.S.C. 311 and the regulations promulgated thereunder.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

No.

NINETY-TWO POINT SEVEN BROADCASTING,
INC. AND MARILYN T. EDWARDS,
PETITIONERS

v.

HANOVER RADIO, INC.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

Pearson Liddell Jr., on behalf of Ninety-Two Point Seven Broadcasting, Inc., and Marilyn T. Edwards, petitions for a writ of certiorari to review the judgement of the Supreme Court of Virginia in this case.

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia (App. A., infra, 1a - 3a) is not reported. The opinion of the Circuit Court of the City of Richmond (App. B, infra, 4a-24a) is not reported.

JURISDICTION

The judgement of the Supreme Court of Virginia (App. A., infra, 1a) was entered February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

STATUTES AND REGULATIONS

1. 47 U.S.C. Section 311

2. 47 C.F.R. Section 73.3525

(See Appendix F, infra, 43a - 51a for verbatim text)

STATEMENT OF THE CASE

1. Petitioner Ninety-Two Point Seven Broadcasting, Inc., ("92.7") is

a corporation formed under the laws of the State of Virginia with its principal office in Richmond, Virginia. Petitioner Marilyn T. Edwards ("Edwards") is the president and chief executive officer of 92.7. Petitioner 92.7 is parents companies, subsidaries or affiliates. Hanover Radio, Inc., ("Hanover") is a corporation formed under the laws of the State of Virginia with its principal office in Richmond, Virginia.

92.7 and Hanover are applicants before the Federal Communications Commission ("FCC") for a mutually exclusive license to construct on FM station in Mechanicsville, Virginia, a suburb of Richmond. The proceeding on this application began in 1978. The proceedings are being held before

Administrative Law Judge Joseph Chachkin ("ALJ Chachkin").

2. In early 1982, 92.7 decided to withdraw from consideration as an applicant and; therefore, agreed to sign a settlement proposal with Hanover which would be submitted to the FCC for its approval. The proposal stated that 92.7 would withdraw its application for the FM station in return for reimbursement of its legitimate and prudent expenses in preparation, filing and prosecution of its application, not in excess of $73,000.00.

On February 4, 1982, 92.7 and Hanover filed a joint request for approval of the settlement proposal (hereinafter called "joint request") pursuant to 47 CFR 73.3525 which

delincates the procedure for filing agreements for removing application conflicts (see App F, infra, 50a-52a).

3. On March 31, 1982, prior to the FCC rendering any decision regarding its acceptance or rejection of the proposal, 92.7 filed a motion with ALJ Chachkin to withdraw the joint request and resume hearings on the applications. On April 7, 1982 ALJ Chachkin approved 92.7's motion to withdraw the joint request and did indeed resume hearings.

4. On April 6, 1982 Hanover filed an action in the Circuit Court of the City of Richmond ("Circuit Court") asking that 92.7 be made to specifically perform the settlement proposal based on said proposal being a contract between two private parties

which is not governed by the FCC.

92.7; however, contended that the Circuit Court did not have jurisdiction because the FCC had direct authority over the proposal pursuant to 47 U.S.C. 311(d)(1) and 47 C.F.R. 73.3525 (b) which states in relevant part: "... No such agreement between applicants shall become effective or be carried out unless and until the FCC has approved it..."

5. On July 20, 1982 a trial on the merits was had before Judge Willard I. Walker of the Circuit Court and on August 17, 1982, Judge Walker ruled that the Circuit Court did have jurisdiction and that the settlement proposed was a valid contract under Virginia law. Judge Walker also ruled that the granting of specific

performance under the contract did not impair or conflict with federal regulation in the field of communication because the FCC still had the ability to accept or reject the proposal. (See App. B, infra, 12a)

6. On September 14, 1982, Judge Walker entered an order directing specific performance of the proposed agreement (See App. C, infra, 25a-33a).

The order directed 92.7 to:

a. withdraw its motion to Withdraw Settlement Proposal and Resume Hearings;

b. file a motion with the FCC which "reaffirms its desire to" execute the joint request

c. refrain from withdrawing, terminating, hampering, hindering, disturbing, or in-

terfering with consideration of the joint request;

d. execute further affidavits necessary to support the joint request and facilitate its approval; and

e. make good faith efforts to resolve any FCC objection to approval of the joint request that might arise in order to obtain FCC approval.

7. 92.7 appealed the Circuit Court decision to the Supreme Court of Virginia based upon the question of whether the Circuit Court had jurisdiction to hear this case. On October 11, 1983 the appeal was granted and the order of the Circuit Court was suspended pending the outcome of the appeal. Subsequently

Hanover filed a Motion to Dismiss Appeal Improvidently Granted relying upon a letter to Hanover's counsel from the FCC general counsel which stated that it was the FCC's position that the Circuit Court's granting of specific performance did not impinge upon the ability of the FCC to regulate communications. On February 6, 1984 the Supreme Court of Virginia granted Hanover's motion, dismissed the appeal, and reinstated the Circuit Court order.

8. 92.7 filed a Motion to Suspend Execution of Circuit Courts Order Pending Appeal to the Supreme Court of the United States of America on March 8, 1984 and on March 22, 1984 said motion was granted (See App. D, infra, 34a - 38a.)

9. The issue regarding the State court's lack of jurisdiction to grant specific performance of the proposed settlement agreement based upon the State court's misconstruction of 47 U.S.C. Section 311(c) and 47 C.F.R. Section 73.3525 was raised in Petitioners' pre-trial motion to dismiss for lack of subject matter jurisdiction. This motion is referred to in the State court's opinion dated August 17, 1982 and indicates that such motion was timely filed in that it was ruled upon by the court. (App. B, infra, 9a). This issue was appealed to The Supreme Court of Virginia on December 9, 1982. (App. E, infra, 42a).

10. The issue regarding the State courts authority to issue an order

directing 92.7 to perform or not to perform specific acts before the F.C.C. was first raised in Petitioner's appeal of the Circuit Courts judgement and order to the Supreme Court of Virginia on December 9, 1982. (App. E, infra, 41a).

11. Both of the aforementioned issues were appealed to the Supreme Court of Virginia on December 9, 1982. The appeal was accepted on October 11, 1983, but then was dismissed on February 6, 1984, prior to argument, when the Supreme Court of Virginia granted Hanover's Motion to Dismiss Appeal Improvidently Granted (App. A, infra, 3a). However, petitioners applied to the Supreme Court of Virginia for a stay of the State court order pending an appeal or writ

of certiorari to the Supreme Court of the United States. This stay was granted on March 22, 1984 and this case is now stayed until this Court completes its review.

REASON FOR GRANTING PETITION

I. Circuit Court's Order Impinges Upon the FCC's Authority to Regulate Communications

The issue raised has dire impact upon the executive authority of regulatory agencies in general and more specifically to the administration of the communications field. Said issue, if left unresolved, will cause severe problems with respect to the understanding and, therefore, the application of communications and administrative law as it applies to the stated courts' authority to regulate and adjudicate private con-

tract matters that have a direct impact on federal regulation of communications:

This case must be heard for two salient reasons:

1. The Supreme Court of Virginia, in refusing to review the Circuit Court decision, has let stand a decision which is in direct conflict with a decision of this Court in Radio Station WOW v. Johnson, 326 U.S. 120,[1/] and

2. The Supreme Court of Virginia, in refusing to review the Circuit Court decision, has let stand a decision which conflicts with the decisions of other state courts of last resort.[2/]

1/ Rule 17.1(c) of the Rules of the Supreme Court of the United States.

2/ Rule 17.1(b) of the Rules of the Supreme Court of the United States.

Conflicts with Decisions of the U.S. Supreme Court

The Supreme Court of Virginia in failing to grant review of the Circuit Court decision has decided a federal question in a way in conflict with applicable decisions of this Court. In Radio Station WOW the Supreme Court of Nebraska voided an assignment of a radio broadcast license based upon fraud and, since the FCC had already approved the transfer of the license, ordered the parties, an insurance company and a radio broadcast corporation "to do all things necessary" to secure the return of the license. This Court in reversing the Nebraska court said "[I]nsofar, as the Nebraska decree orders the parties 'to do all things necessary' to secure the return

of the license, it hampers the freedom of the Society not to continue in broadcasting and to restrict itself... to its insurance business. Equally does it prevent WOW from opposing a return to the Society.... These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of the parties before the Communications Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it. "Radio Station WOW, supra, 130-31.

In the case at bar the Circuit

court directed 92.7 to do and refrain from doing certain specific acts before the FCC (App C, infra, 27a-32a). Such specific acts hamper the freedom of 92.7 to oppose the granting of the license to Hanover or to pursue the license for itself. This is a blatant and unobscured violation of the holding in Radio Station WOW.

How can the Circuit Court order not impinge upon the ability of the F.C.C. to regulate communications when pursuant to the Circuit Court order Edwards is forced to sign an affidavit with which she does not agree? But for the stay pending this application for writ of certiorari by the Supreme Court of Virginia, the FM license would now be Hanover's. 92.7 could protest the approval of the

settlement agreement in no manner without being in contempt of the Circuit Court order.

Moreover, as a result of the Circuit Court order 92.7 is prevented from pursuing this matter through the appellate processes of the FCC and in the federal court system without simultaneously by being held for contempt. Only this Court can prevent such a gross miscarriage of justice by granting this writ of certiorari. If certiorari is denied 92.7 effectively loses all of its rights.

The cases on which the Circuit Court relies are not applicable here. (App. B, infra, 9a-12a). Regents of the University System of Georgia v. Carroll, 338 U.S. 586 (1950) applies

only to situations where money damages and an accounting are the remedies requested. Further, Carroll, supra, deals with the contractual rights of a third party who is not a part of the FCC process and it does not deal with the contractual rights affected by 47 U.S.C. Section 311(c) as in this case.

Likewise, all of the FCC cases cited in support of the Circuit Court's contention that it has jurisdiction,[3/] except In re Amax Broadcasting, Inc., 88 F.C.C. 2d 607, 50 R.R. 798 (1981), do not

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3/ In re Application of Trancontinent Television Corp. (WROC-TV), 21 R.R. 945 (1961); Gerald J. Block, 36 R.R. 2d 924 (1976); In re John F. Runner, Receiver (KBIF), 36 R.R. 2d 773 (1976); In re Amax Broadcasting, Inc., 88 F.C.C. 2d 607, 50 R.R. 2d 798 (1981).

concern agreements of withdrawal from mutually exclusive construction permit applications. Even Amax, supra, is lacking because it concerns the right of a party who was not a part of the administrative process at the time two other applicants entered into an agreement to withdraw, to repudiate the agreement between the other applicants. Further, the FCC had approved the agreement to withdraw prior to the party re-entering the administrative process.

Conflicts with State Courts of Last Resort

State court decisions dealing with the issue presented herein have consistently held that the state court may adjudicate controversies involving private contracts which

touch on communications matters only where the state court does not interfere with the broadcast licensing process.[4/]

In Themy the defendants admitted that they failed to make payments pursuant to the terms of two operative agreements regarding the purchase of a radio station. The agreements included a forfeiture clause regarding the equipment and the license. The Supreme Court of Utah while affirming a summary judgment for plaintiff stated: "The judgment simply enforces the terms of the agreements providing for forfeiture upon default by the

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4/ Themy v. Seagull Enterprises, Inc. (Utah, 1979), 595 P. 2d 526; Minnesota-Iowa Television v. Watonwon T.V. Improvement Association (Minn., 1980), 294 N.W. 2d 297.

purchaser, and declares the owner of the interests in the radio station and the license to be Themy. It does not require the parties to take any specific action regarding a retransfer of the license, as in Radio Station WOW, Inc. Significantly, the judgment did not grant Themy's requested relief for 'a mandatory injunction requiring... defendants to assist plaintiff in obtaining transfer of the FCC license into plaintiff's name.'" Themy, supra, at 532.

In Minnesota-Iowa, supra, the Supreme Court of Minnesota, affirmed the enforcement of a contract between a television station and a non-profit organization prohibiting the broadcast of duplicate signals. The Minnesota court reasoned it had jurisdiction

because although the decision enforced the rights of parties with respect to the contract, it did not impinge upon the authority of the FCC to regulate the licensing of broadcasts because, contrary to the Nebrska court in Radio Station, WOW, it did not order the parties to do anything before the FCC regarding a transfer of a license, Minnesota-Iowa, supra, at 305.

Whereas Themy and Minnesota-Iowa specifically avoid mandating parties to take any action before the FCC regarding the licensing process, the Circuit Court in this case goes to great lengths to involve itself in the FCC licensing process (App C, infra, 27a-32a) and therefore conflicts with the Utah and Minnesota holdings.

II. State Court is Without Subject Matter Jurisdiction

The importance of this issue cannot be overstated since it concerns the authority of a state court to validate a proposed settlement agreement prior to a condition precedent, where Congress mandated that such proposed settlement agreement is unlawful until such condition precedent actually occurs. Congress has mandated that it is unlawful to effectuate an agreement to withdraw between two applicants for a mutually exclusive construction permit[5/] with-

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5/ 47 U.S.C. Section 311(c)(1) states: "If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unalwful, without approval of the Commission, for the applicants or any of them to effectuate on agreement whereby one or more applicants withdraws his or their applications." (Emphasis added).

out approval of the FCC.

The intent of Congress was that the FCC gain complete control of these agreements since there had been substantial problems with applicants buying out other applicants and in effect buying the broadcast license, which actions Congress deemed not in the public interest. The language of the statute states clearly the meaning of the statute and the purpose for which the statute was enacted makes this meaning that much clearer. Chapman v. Hamilton Welfare Rights Org, 441 U.S. 600, 608 (1979). Also, see Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979).

The attendant regulation states, in pertinent part, "... No such agreement between applicants shall

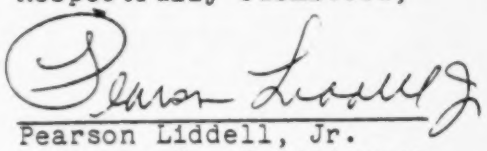
become effective or carried out unless and until the FCC approves it...." 47 C.F.R. Section 73.3525(b). (Emphasis added). The language in neither the statute nor the regulation equivocates as it sets this condition precedent. The Circuit Court was therefore erroneous in accepting jurisdiction in this case.[6/]

6/ The Supreme Court of Virginia has held that there can be no specific performance of a contract which is subject to a condition unless that condition has been fulfilled or excused. R.G. Pope Construction Company, Inc. v. Guard Real of Roanoke, Inc., 219 Va 111, 118, 244 S.E. 2d 774, 778 (Va. 1978)

CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted;

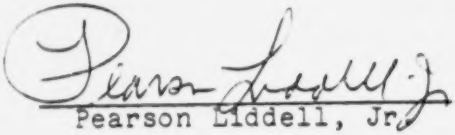


Pearson Liddell, Jr.
Attorney for Petitioners

May 4, 1984

CERTIFICATE OF SERVICE

This is to certify that I served three copies of the foregoing Petition for Writ of Certiorari upon the respondent, Hanover Radio, Inc., by mailing three copies thereof, in a duly addressed envelope, postage prepaid, to Arthur H. Horwitz, Esquire, Post Office Box 11435, Richmond, Virginia 23230-1435 and whose telephone number is (804) 288-3259, the 4th day of May, 1984.



Pearson Liddell, Jr.

Appendix A

Opinion - Order of the
Supreme Court of Virginia

Dated February 6, 1984

Record No. 822184

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of February, 1984.

Ninety-Two Point Seven Broadcasting, Inc., and Marilyn T. Edwards,

Appellants,

against Record No. 822184
Circuit Court No. G-7536-3

Hanover Radio, Inc.,

Appellee.

Upon an appeal and suspension of judgment from a judgment rendered by the Circuit Court of the City of Richmond, formerly the Circuit Court of the City of Richmond, Division I, on the 14th day of September, 1982.

On consideration of all the pleadings and other documents filed herein subsequent to the granting of

the appeal and suspension of judgment in this case, it is ordered that said appeal and suspension of judgment heretofore awarded in this case on October 11, 1983, be dismissed as improvidently awarded.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

I, David B. Breach, Deputy Clerk of the Supreme Court of Virginia, do hereby certify that this is a true copy of an order entered by this Court on February 6, 1984, in the case of Ninety-Two Point Seven Broadcasting, Inc., et al. v. Hanover Radio, Inc., Record No. 822184.

Given under my hand and seal of said Court this 27th day of April, 1984.

Deputy Clerk

Appendix B

Opinion of the Circuit Court
of the City of Richmond

Dated August 17, 1982

Circuit Court No. G-7536-3

Circuit Court

OF THE

City of Richmond

August 17, 1982

Mr. Sa'ad El-Amin
Sa'ad El'Amin and Associates
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Mr. Arthur H. Horwitz
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Mr. Manuel R. Geraldo
Robinson & Geraldo, P.C.
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Washington, D.C. 20002

Gentlemen:

Re: Hanover Radio, Inc.
v. Ninety-Two Point Seven
Broadcasting, Inc., et al.

This matter is before the court of plaintiff's action for breach of contract, seeking the remedy of

specific performance. Based on findings outlined below, I conclude that the settlement agreement between the parties constitutes an enforceable contrat and that plaintiff is entitled to specific performance thereof.

The facts are as follows: Hanover Radio, Inc., (Hanover) and Ninety-Two Point Seven Broadcasting, Inc. (92.7) have been involved in proceedings before the Federal Communications Commission (FCC) that will determine who will be awarded the broadcasting license for Mechanicsville, Virginia. In the course of these proceedings the respective presidents of Hanover and 92.7 signed a settlement agreement (Agreement), for the stated purpose of resolving "the conflict between their mutually-exclusive applications."

Under the Agreement 92.7 agreed to withdraw its application in return for reimbursement of its expenses by Hanover (not to exceed $73,000). On February 4, 1982, the parties filed a joint request for approval of agreement pursuant to Section 73.3525 of the FCC rules. The joint request summarized the agreement as follows:

> The agreement contemplates that the application of 92.7 be dismissed, that the application of Hanover be granted, and that Hanover will reimburse 92.7 for its legitimate and prudent expenses in the preparation, filing and prosecution of its application, subject to prior FCC approval. Reimbursement will be made in the amount stated in the agreement, or in an

amount approved by the Commission, whichever is lower.

The Broadcast Bureau responded to the joint request on March 10, 1982, recommending that the FCC grant the license to Hanover with reimbursement to 92.7 in the amount of $57,716.90. On March 26, 92.7 filed a reply to the Broadcast Bureau's recommendations providing further documentation to substantiate additional expenses. Five days later, on March 31, 1982, 92.7 by its newly retained attorneys, filed amotion with the FCC to withdraw the settlement proposal and resume hearings. Subsequently, 92.7 has resumed active pursuit of the FCC license for Mechanicsville. Plaintiff alleges that defendant's refusal to proceed according to the terms of the

Agreement constitutes a breach of contract. Trial of this action on July 20, 1982, produced three primary issues for resolution by this court. First, does this court have subject matter jurisdiction? Second, was the signature of 92.7's president sufficient to bind the corporation despite lack of formal authorization? Third, are the circumstances appropriate for an award of specific performance?
In its motion to dismiss for lack of subject matter jurisdiction, 92.7 identifies the essential question as whether the state court's determination would impair or conflict with federal regulation of the field of communications. Although the Federal Communications Act gives the FCC exclusive jurisdiction over radio broadcasting,

the Supreme Court has refused to read this act as giving the FCC authority "to determine the validity of contracts between licensees and others." Regents of the University System of Georgia v. W.E. Carroll, 338 U.S. 586, 602 (1950). The FCC itself consistently maintains the position that it has no jurisdiction over the private contract rights and obligations of parties, even though the subject matter of such contracts concerns broadcasting facilities. In re Application of Transcontinent Television Corp. (WROC-TV), 21 Rad. Reg. (P & F) 945 (1961), Gerald J. Block, 36 Rad. Reg. (P & F) 924 (1976). In its ruling in a dispute about the proper interpretation of an agreement regarding radio station

fa i ities, the FCC noted that this was the "sort of dispute which cannot be resolved by the Commission and is best left to the local courts." In re John F. Runner, Receiver (KBIF), 36 Rad. Reg. 2d (P & F) 773, 778 (1976). By the same token, local courts have maintained their jurisdiction over private contractual matters. As the Supreme Court of Utah noted, "the fact that the agreement concerns a radio station does not divest the court of jurisdiction." Themy v. Seagul Enterprises, Inc., 595 P. 2d 526 (Utah 1979).

Under the facts of this case the court is being asked merely to determine the respective rights of the parties under a private agreement. Enforcement of the Agreement between

Hanover and 92.7 will not impair or conflict with the FCC's exclusive jurisdiction over radio broadcasting, especially since the Agreement remains subject to FCC approval. By the FCC's own interpretation, settlement agreements among mutually exclusive applicants are "private contractual arrangements." In re Anax Broadcasting, Inc., 88 F.C.C. 2d 607, 611, 50 Rad. Reg. (P & F) 798, 801 (1981). I conclude that this court is the appropriate jurisdiction for a determination of the rights of the parties under the Agreement.

Was the signature of Marilyn Edwards, President of 92.7, without formal authorization or execution, sufficient to bind the corporation to the Agreement? A close examination of

the structure and operation of the defendant corporation is essential to resolve this issue. The record before the court reveals that Marilyn Edwards transacted business on behalf of 92.7 since its formation and that her signature alone as President has been accepted routinely as authorized by 92.7. In addition to being President of 92.7, Ms. Edwards is the majority stockholder, holding 86% of the corporate shares. The outstanding 14% is held by two other stockholders, Conway Downing, Sr. and John Crawford, who own 9% and 5%, respectively. Ninety-Two Point Seven's stockholders consistently deferred to Ms. Edwards's judgment in handling all matters affecting 92.7.

The law of Virginia regarding a

corporate officer's authority to bind the corporation has emerged through a series of Virginia Supreme Court cases. In Sterling v. Trust Co. of Norfolk, 149 Va. 867 (1927), the court said:

> When in the usual course of the business of a corporation an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact business. When the agent acts in the usual course of the corporation business with apparent authority, the corporation will not be permitted to escape liability by a plea of want of

authority of its agents. . . .
That a corporation should act through its board of director is clear, however, "when with the knowledge and acquiescence of all of its stockholders it declines so to do, it must accept the consequences." Moore v Aetna Co., 155 Va. 556, 570 (1930). Dr. Downing's acquiescence to the Agreement is evidenced by a letter from his son, an attorney, to the attorneys representing 92.7 before the FCC. Although there is conflicting testimony regarding the extent of John Crawford's actions in providing expense information, needed to support the joint request for approval of the Agreement by the FCC, is indicative of his acquiescence. The record is clear that Marilyn Edwards communicated informally by

telephone with John Crawford, her father-in-law, on matters concerning 92.7. Following the signing of the Agreement on February 4, 1982, 92.7 proceeded pursuant to its terms with the acquiescence in this action by the stockholders of 92.7.

The Supreme Court in Brewer v. First National Bank stated the rule applicable to close corporations:

> It is generally recognized that where there is a family, or close corporation, such as the one involved in this case, in which the stockholders, officers and directors ignore the requirements of the statutes and corporate by-laws, and conduct its business in an informal manner, the actions so taken

may, nonetheless, be binding upon the corporation.

202 Va. 807, 812-813 (1961).

The agreement in Brewer was found binding despite the fact that it was neither authorized at a formal meeting of the board nor executed in the proper manner. It was clear to the court "from the actions of the parties, from the circumstances surrounding and subsequent to the execution of the agreement, and from the agreement itself, that it was intended, by all concerned , to be the act of the corporation." Id. at 813.

Ninety-Two Point Seven is a close corporation that admittedly conducts its business in an informal manner. The actions of the parties and the circumstances subsequent to the

execution of the Agreement by Marilyn Edwards similarly support the conclusion that it was intended to be the "act of the corporation." The only other stockholders were informed of the Agreement subsequent to its signing and 92.7 acted pursuant ot its term for almost two months in proceedings before the FCC. The knowledge and acquiescence of Downing and Crawford in the Agreement constitutes de facto authorization sufficient to bind the corporation and its stockholders. Defendants argue that the contract is not valid because the corporation did not follow the procedures required by § 13.1 - 77 of the Code of Virginia for disposition of corporate assets. In view of the fact that 92.7 admittedly has no assets. I find this code

section inapplicable.

Are the circumstances appropriate for an awared of specific performance? Specific performance is not a matter of right, but an extraordinary remedy available within the second discretion of the court. 17 M. J., Specific Performance, § 2 (1979). Before using its discretion to award specific performance, the court must be convinced that plaintiff's remedy at law is inadequate and that the contract terms are certain enough and enforceable by the court without tremendous difficulty. Thompson v. Commonwealth, 197 Va. 208 (1951).

Plaintiff argues that the two primary elements of inadequacy of a legal remedy are present here: the contract concerns a license to operate a radio

station which is unique and the damages for breach are too speculative to be ascertained. The Agreement itself acknowledged that the license applications by Hanover and 92.7 were mutually exclusive, since the FCC would be granting only one license for the Mechanicsville, Virginia, area. Defendant's breach of the contract threatens plaintiff with the possibility of loosing the license to operate the only station in Mechanicsville, whereas performance of the contract virtually assured Hanover of securing the license, since it would be the sole remaining applicant. Since there has been no radio station in operation in Mechanicsville, there is no basis to

even estimate the value of the license in terms of anticipated earnings over the course of the stations's operation. The damages flowing from plaintiff's loss are totally speculative and conjectural.

Cases from other jurisdictions that have ruled on contracts involving broadcasting facilities under facts similar to those presented here support plaintiff's claim that specific performance is indeed appropriate. Commercial Radio Institute v. Western Pennsylvania Christian Broadcasting Co., 428 F. Supp. 1054 (W.D. Pa. 1979), Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co., Inc., 414 F. 2d 750 (1969), Stanley T. Deck v. Guy S. Erway, No. 124494, Memorandum of Decision, Superior court of the

State of California for the County of Santa Barbara (1980).

The Supreme Court of Virginia has identified the prerequisite circumstances for an award of specific performance in this state:

> The contract must not only be distinctly proved, but it must be clearly and distinctly ascertained; it must be reasonable, certain, legal, mutual; upon valuable, or at least a meritorious, consideration; and the party seeking specific performance must not have been backward, but ready, desirous, prompt and eager.

Colonna Dry Dock Co. v. Colonna, 108 Va. 230, 239 (1908).

The record before this court substantiates the presence of these

elements. The signed Agreement between the parties has been proven and its terms are clear, certain and reasonable. Plaintiff has duly performed its obligation under the Agreement and is and has been ready, willing and able to pay the defendants the consideration due under the Agreement's terms.

In addition to being entitled to specific performance of the Agreement on the terms contained therein, plaintiff is entitled to its costs. Counsel for the plaintiff, Hanover Radio, Inc., will please tender a properly endorsed sketch of an order consistent with this opinion.

Very truly yours,

Willard I. Walker

Appendix C

Order of the Circuit Court
of the City of Richmond

Dated September 14, 1982

Circuit Court No. G-7536-3

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND , DIVISION I

ON THE 14th DAY OF SEPTEMBER, 1982.

HANOVER RADIO, INC., A Virginia Corporation,

Plaintiff

G-7536-3

v.

NINETY-TWO POINT SEVEN BROADCASTING, INC., A Virginia Corporation, and its officers, directors, and stockholders,

and

MARILYN T. EDWARDS,

Defendants.

ORDER

This cause, which has been regularly docketed, matured, and set for hearing, came on this day to be heard upon the bill of complaint; upon the amended bill of complaint; upon the answer of the defendants;

upon evidence heard ore tenus on July 20, 1982, and upon argument of counsel.

Upon consideration whereof the Court doth ORDER the defendant Ninety-Two Point Seven Broadcasting, Inc., its officers, directors, and stockholders, hereinafter referred to as "Ninety-Two Point Seven" and Marilyn T. Edwards, hereinafter referred to as " Edwards" to specifically perform the terms of the settlement contract of February 2, 1982, filed with the Federal Communications Commission, hereinafter referred to as the "FCC" on February 4, 1982, and cease and desist from any actions before the "FCC" inconsistent with the terms of said contract;

Further it is ORDERED that defendant "Ninety-Two Point Seven",

its agents, servants, employees,a nd attorneys and defendant "Edwards" are hereby enjoined to promptly withdraw the "Motion To Withdraw Settlement Proposal and Resume Hearing" filed by "Ninety-Two Point Seven" with the "FCC" on March 31, 1982, and to do so promptly and in no event later that September 20, 1982.

Further it is ORDERED that defendant "Ninety-Two Point Seven," its agents, servants, employees, and attornyes and defendant "Edwards" are hereby enjoined to execute and file with the "FCC", promptly and in no event later than September 20, 1982, a motion that reaffirms defendant "Ninety-Two Point Seven's" interest in prosecuting the "Joint Request For Approval of Agreement," hereinafter

referred to as "Joint Request," filed with the "FCC" on February 4, 1982, and subsequent pleadings in support of said "Joint Request," and requests that the "FCC's" Presiding Administrative Law Judge grant the "Joint Request" as expeditiously as possible. This motion shall contain the following language or language of similar import:

"'Ninety-Two Point Seven' respectfully moves to withdraw its March 31, 1982, pleading seeking to withdraw the "Joint Request." "Ninety-Two Point Seven" reaffirms its desire to have the "Joint Request" granted as expeditiously as possible. "Ninety-Two Point Seven" seeks dismissal of its application with prejudice and payment of its properly reimbursable

expenses as described in its February 1982 pleadings."

Further it is ORDERED that defendant "Ninety-Two Point Seven" its agents, servants, employees, and attorneys and defendant "Edwards" are hereby enjoined not to withdraw, terminate, hamper, hinder, disturb, or interfere with, through any written or oral presentation to the "FCC," or in any manner whatsoever, the submission and consideration of the "Joint Request;"

Further, it is ORDERED that defendant "Ninety-Two Point Seven," its agents, servants, employees, and attorneys and defendant "Edwards" shall execute for filing with the "FCC" such further affidavits, documents, or information relating to

the "Joint Request," as may be requested by the "FCC," or the "FCC's" Administrative Law Judge, or the "FCC's" Broadcast Bureau, and that are necessary to support the "Joint Request" and facilitate its approval by the earliest possible date.

Further it is ORDERED that defendant "Ninety-Two Point Seven," its agents, servants, employees, and attorneys and defendant "Edwards" will make good faith efforts to resolve any "FCC" objection to approval of the "Joint Request" that might arise in order to obtain "FCC" approval.

Further it is ORDERED that defendants "Ninety-Two Point Seven" and "Edwards" shall pay plaintiff the sum of $92.50 as reimbursement of its

costs.

Inasmuch as the relief afforded in this case is injunctive in fact and/or in nature, it is ORDERED that the court's judgment herein will not be suspended pending appeal to the Supreme Court of Virginia.

It is further ORDERED that the defendant post a bond in the amount of One Thousand Dollars ($1,000) with proper survey conditioned to pay appellate costs as provided in Code of Virginia § 8.01-676. The defendants by counsel object.

I, IVA R. PURDY, Clerk of the Circuit Court of the City of Richmond, J.M. Courts Bldg., do certify that the foregoing is a true copy of the order entered in the above styled cause on the date aforesaid.
Given under my hand and the official seal

of my said Court this
27th day of April, 1984.

By_____
Deputy Clerk

Appendix D

Order of the Supreme Court
of Virginia Granting

Stay of Circuit Court Order

Record No. 822184

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 11th day of October, 1983.

Ninety-Two Point Seven Broadcasting, Inc., et al.,

Appellants,

against Record No. 822184
Circuit Court No. G-7536-3

Hanover Radio, Inc.,

Appellee.

From the Circuit Court of the City of Richmond, Formerly the Circuit Court of the City of Richmond, Division I

Upon the petition of Ninety-Two Point Seven Broadcasting, Inc., and Marilyn T. Edwards an appeal and suspension of judgment is awarded them from a judgment rendered by the Circuit Court of the City of Richmond, formerly the Circuit Court of the

City of Richmond, Division I, on the 14th day of September, 1982; in a certain chancery cause then therein depending, wherein Hanover Radio, Inc., was plaintiff and the petitioners were defendants.

And it appearing that an appeal bond in the penalty of $1,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8.01-676 of the Code, no additional bond is required.

This appeal, however, is limited to the consideration of the following issue:

Whether the circuit court lacked subject matter jurisdiction and is pre-empted from entering a decree which effectively overrules a final

decision of the Federal Communications Commission and directly impinges upon the Commission's exclusive licensing authority.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germaine to the above issue, and the briefs to be filed shall be limited to such discussion as is relevant to the issue upon which this appeal is awarded.

The petition for appeal is refused as to the remaining issues.

A Copy,

Teste:

SUPREME COURT OF VIRGINIA

SUPREME COURT BUILDING
RICHMOND, VIRGINIA 23219

Certificate

I, David B. Beach, Deputy Clerk of the Supreme Court of Virginia, do hereby certify that attached hereto is a true copy of an order entered by this Court on October 11, 1983, in the case of Ninety-Two Point Seven Broadcasting, Inc., et al. v. Hanover Radio, Inc., Record No. 822184.

Given under my hand and seal of said Court this 27th day of April, 1984.

Deputy Clerk

Appendix E

Appeal of 92.7 to the
Supreme Court of Virginia
(Issues Only)

Record No. 822184

IN THE
SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

NINETY-TWO POINT SEVEN BROADCASTING INC.
A Virginia Corporation, and its
Officers, Directors and Stockholders

and

MARILYN T. EDWARDS,

Appllants

v.

HANOVER RADIO, INC.
A Virginia Corporation

Appellee,

Petition for Appeal

Manuel R. Geraldo
Robinson & Geraldo, P.C.
1330 G Street, S.E.
Washington, D.C. 20003
(202) 544-2889

Manuel R. Geraldo, Esquire
436 N. Armistead Street
Suite 103
Alexandria, Virginia 22312

ASSIGNMENTS OF ERROR

I. The Circuit Court Erred in Entering a Decree Which Effectively Overrules a Final Decision of the Federal Communications Commission and Directly Impinges Upon the Commission's Exclusive Licensing Authority.

II. The Circuit Court Erred in Ordering Appellant to Take Certain Actions in Specific Performance of the Agreement between Appellant and Appellee.

QUESTIONS PRESENTED

I. Whether the Circuit Court Lacked Subject Matter Jurisdiction and is Preempted From Entering a Decree Which Effectively Overrules a Final Decision of the Federal

Communications Commission and Directly Impinges Upon the Commission's Exclusive Licensing Authority?

II. Whether the Circuit Court's Final Decree, Ordering Appellant to Take Certain Actions in Sepcific Performance of the Agreement between Appellant and Appellee, is Appropriate in This Case?

A. Is the Third Party Contract Subject to a Condition Precedecent Which Never Occurred Enforceable?

Appendix F

Statutes and Regulations

47 U.S.C. Section 311

47 C.F.R. Section 73.3525

47 U.S.C. Section 311. Requirements as to certain applications in the broadcasting service

(a) Notices of filing and hearing; form and contents. When there is filed with the Commission any application to which section 309(b)(1)[47 USCS § 309(b)(1)] applies, for an instrument of authorization for a station in the broadcasting service, the applicant--

(1) shall give notice of such filing in the principal area which is served or is to be served by the station; and

(2) if the application is formally designated for hearing in accordance with section 309 [47 USCS § 309], shall give notice of such hearing in such area at least ten days before commence-

ment of such hearing.

The Commission shall by rule prescribe the form and content of the notices to be given in compliance with this subsection, and the manner and frequency with which such notices shall be given.

(b) Place of hearing. Hearings referred to in subsection (a) may be held at such places as the Commission shall determine to be appropriate, and in making such determination in any case the Commission shall consider whether the public interest, convenience, or necessity will be served by conducting the hearing at a place in, or in the vicinity of, the principal area to be served by the station involved.

(c) Agreement between two or more

applicants; approval of Commission; pendency of application. (1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form,

and manner as the commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment tc any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to

be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

(4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

(June 19, 1934, ch 652, Title III, Part I, § 311, 48 Stat. 1086; May 20, 1937, ch 229, § 10(a), 50 Stat. 192; July 16, 1952, ch 879, § 9, 66 Stat. 716; Sept. 13, 1960, P. L. 86-752, § 5(a), 74 Stat. 892.)

47 C.F.R. Section 73.3525 Agreements for removing application conflicts.

(a) Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the FCC by withdrawal or amendment of an application or by its dismissal pursuant to § 73.3568, all parties thereto shall, within 5 days after entering into the agreement, file with the FCC a joint request for approval of such agreement. The joint request shall be accompanied by a copy of the agreement and an affidavit of each party to the agreement setting forth in full all relevant facts including, but not limited to:

(1) The exact nature of any consid-

eration (including an agreement for merger of interests) promised or paid;

(2) Information as to who initiated the negotiations;

(3) Summary of the history of the negotiations;

(4) The reasons why it is considered that the arrangement is in the public interest; and

(5) A statement fully explaining and justifying any consideration paid or promised.

(b) The affidavid of any applicant to whom consideration is paid or promised shall, in addition, include an itemized accounting of the expenses incurred in connection with preparing, filing and advocating his application, and such factual information as the

parties rely upon for the requisite showing that such reported expenses represent legitimate and prudent outlays. No such agreement between applicants shall become effective or be carried out unless and until the FCC has approved it, or until the time for FCC review of the agreement has expired.

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